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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-408

VALERIO SANTOS and SALVADOR G. SANTOS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEREMIAH INGELS RHODES
P. O. Box R
Eagle Pass, Texas 78852

Attorney for Petitioners

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No.

VALERIO SANTOS and SALVADOR G. SANTOS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Valerio Santos and Salvador G. Santos, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on July 9, 1973, affirming the Judgment of the District Court, and the Order of said Court of Appeals denying Petitioners' Motion for rehearing which was entered August 7th, 1973.

OPINION OF THE COURT BELOW

Appended hereto is a copy of the opinion of the Fifth Circuit Court of Appeals.

JURISDICTION

This Court has jurisdiction under Title 28 U.S. Code Sec. 1254(1). The Judgment of the Court of Appeals was dated and entered July 9, 1973, and the Judgment denying these Petitioners' Petition for rehearing was dated and entered August 7th, 1973.

QUESTIONS PRESENTED FOR REVIEW

1. **Was there sufficient evidence at the trial of this case to sustain a conviction of Petitioners?**
2. **Was it plain error for the District Court to fail to give a cautionary instruction to the Jury as to accomplice testimony in the absence of a request for such instruction, or an objection to the Courts' failure to give such instruction?**

STATUTES INVOLVED

This case involves a conviction for violation of the following Sections of the United States Code.

TITLES 18:

Section 922(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver —

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does

not reside in . . . the State in which the licensee's place of business is located . . .

(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Section 922(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

Section 924(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000.00, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Section 371. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof

in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. . .

RULE 52 (b) FEDERAL RULES OF CRIMINAL PROCEDURE
PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Petitioner Valerio Santos was convicted on thirteen (13) counts and Petitioner Salvador G. Santos on four (4) counts, of a sixteen (16) count indictment.

Counts I, IV, VII and X allege that in four (4) separate transactions Valerio Santos sold and delivered a firearm to a person not residing in the State of Texas, whom he then and there knew and had reasonable cause to believe did not reside in the State of Texas in violation of Section 922(b)(3), Title 18, United States Code.

Counts II, V, VIII and XI allege that in four (4) separate transactions Valerio Santos sold a firearm, and failed to note in records the name, age and place of residence of the Purchaser, in violation of Section 922 (b)(5), Title 18, United States Code.

Counts III, VI and XII allege that in four (4) separate transactions Valerio Santos made a false entry in records by showing one person as Purchaser, when the firearm was in fact sold to another person, in violation of Section 922(m), Title 18, United States Code.

Count XIII alleges that Salvador G. Santos aided and abetted Valerio Santos in selling a firearm to a person not residing in the State of Texas, in violation of Section 922(b)(3), Title 18, United States Code.

Count XIV alleges that Salvador G. Santos aided and abetted Valerio Santos in selling a firearm to a Purchaser and failing to note in records the name, age and place of residence of such Purchaser in violation of Section 922(b)(5), Title 18, United States Code.

Count XV alleges that Salvador G. Santos aided and abetted Valerio Santos in making a false entry in records by showing one person as Purchaser, when the firearm was in fact, sold to another person, in violation of Section 922(m), Title 18, United States Code.

In Count XVI of the indictment, Defendants, Valerio Santos and Salvador G. Santos are alleged to have been guilty of a conspiracy to violate Section 922(b)(3), 922(b)(5), 922(m) and 924(a), Title 18 of the United States Code by selling firearms to non-residents of Texas, by failing to keep records, and by making false entries in records, in violation of Section 371, Title 18, United States Code.

Both Defendants plead not guilty and were tried together on November 1st and 2nd, with a finding of guilty on all counts being returned by the Jury.

On December 12th, 1972, Valerio Santos was sentenced to concurrent sentences, being a fine of $5,000.00, and two (2) years on each of Counts I through XII, and a fine of $10,000.00 on Count XVI. Total sentence two years imprisonment and a fine of $10,000.00.

On the same day Salvador G. Santos was sentenced to concurrent sentences, being a fine of $1,000.00, and two (2) years on each of Counts XIII, XIV, XV and XVI; six (6) months to serve, remainder suspended, with three (3) year probation. Total sentence two years with six months imprisonment, balance suspended for a period of three years, and $1,000.00 fine.

There was no evidence, direct or circumstantial, tending to show or imply any unlawful conspiracy between Petitioners, except testimony presented by the Government as to Counts XII, XIV and XV of the indictment, which testimony was insufficient to support a conviction under Count XVI of the indictment, the conspiracy count.

The government's proof as to all counts in the indictment vested in a substantial part on circumstantial evidence as to the residence of the "Purchaser", and other matters, which circumstances did not reasonably preclude any conclusion other than guilt. For instance, the government's proof as to Count I was wholly insufficient to prove the actual residence of the "purchaser".

Weaknesses in the government's proof as to one transaction were, it is submitted, bolstered in the Jury's mind by unrelated proofs as to another transaction resulting in blanket conviction on all counts, and a substantial injustice to Petitioners.

The principal witnesses for the government at the trial were people who had personally signed Firearms Transaction forms at the store of Petitioner, Valerio Santos.

The Court of Appeals has held that these witnesses were not accomplices.

It is submitted that this holding is in conflict with *U. S. v. Lester*, 363 Fed. 2d 68 (6th Circuit) and *Hagerty v. U. S.*, 5 Fed. 2d, 224 (7th Circuit).

It is submitted that the government's case rested primarily on accomplice testimony, and that it was plain error under Rule 52(b), Fed. R. Crim. P. for the trial court to fail to give sua sponte, a cautionary instruction as to the weight to be given to accomplice testimony. A contrary holding would be in conflict with *U. S. v. Birmingham*, 447 Fed. 2d, 1313 (10th Circuit) and *U. S. v. Owens*, 460 Fed. 2d, 268 (10th Circuit).

This is particularly true where, as here, the great preponderance of the testimony shows Petitioners to be persons of excellent character, of long residence in the community, and with no prior criminal record whatever.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari should be granted to prevent a miscarriage of Justice, and to resolve conflicts between the 5th Circuit and the 6th and 7th Circuits as to who is an accomplice, and between the 5th Circuit and the 10th Circuit as to the Application of Rule 52(b), Fed. Rule of Criminal Procedure to a situation where the Court has failed to give a cautionary instruction concerning accomplice testimony.

RESPECTFULLY SUBMITTED.

Jeremiah Ingels Rhodes
Attorney for Petitioners,
Valerio Santos and
Salvador G. Santos
P. O. Box R
Eagle Pass, Texas 78852

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of August, A.D., 1973, three copies of this Petition were placed in the U.S. Mails with first class postage prepaid, addressed to James W. Kerr, Jr., Assistant U.S. Attorney, P. O. Box 1701, San Antonio, Texas, 78296, and another three copies were placed in the U.S. Mails with Air Mail Postage prepaid, addressed to the Solicitor

General, Department of Justice, Washington, D.C. 20530.

Jeremiah Ingels Rhodes
Attorney for Petitioners
P. O. Box R
Eagle Pass, Texas 78852

APPENDIX

NOTICE OF APPEAL

Filed: Dec. 21, 1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

CRIMINAL NO.

versus DR-72-CR-364

VALERIO SANTOS and SALVADOR G. SANTOS

NOTICE IS HEREBY GIVEN That Valerio Santos, Defendant above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 12th day of December, A.D., 1972.

/s/ JEREMIAH INGELS RHODES
Jeremiah Ingels Rhodes
Attorney for Valerio Santos
P. O. Box R
Eagle Pass, Texas 78852

NOTICE OF APPEAL

Filed: Dec. 21, 1972

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA

CRIMINAL NO.

versus DR-72-CR-364

VALERIO SANTOS and SALVADOR G. SANTOS

NOTICE IS HEREBY GIVEN That Salvador G. Santos, Defendant above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 12th day of December, A.D., 1972.

/s/ JEREMIAH INGELS RHODES
Jeremiah Ingels Rhodes
Attorneys for Salvador G. Santos
P. O. Box R
Eagle Pass, Texas 78852

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1101
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SALVADOR G. SANTOS and VALERIO SANTOS,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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(July 9, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: Valerio and Salvador Santos appeal from their conviction of various violations of the Gun Control Act of 1968, 18 U.S.C.A. §922. We affirm.

Appellants' main contention is that there was not sufficient evidence to convict them on each count of

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

the sixteen count indictment.[1] Our review of the record convinces us that this is not true.

Appellants also contend that it was plain error for the court to fail to give a cautionary instruction as to the weight to be accorded the testimony of an accomplice without a request for such an instruction or an objection to the court's failure to give it. The answer to this contention is that the government did not rely on accomplices' testimony. The witnesses for the government may have violated Title 18, U.S.C., Section 922(a), by acquiring or assisting other purchasers to acquire weapons but each of the substantive counts, Count I through Count XV, inclusive, charged the Appellants with offenses as firearms dealers in violation of Title 18, U.S.C. Sections 922(b)(3), 922(b)(5) and 922(m). If the testimony had been offered in proof of the charges against the purchasers, a cautionary instruction as to the weight to be afforded accomplices' testimony would have been appropriate. It was clearly not called for in the circumstances present here, where none of the government witnesses knowingly corroborated with or aided or abetted either appellant. As to Count XVI, the conspiracy count, there was no evidence that any government witness was a co-conspirator or collaborated in the violations of the Firearms Act by appellants.

AFFIRMED.

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[1]Valerio Santos is charged with twelve substantive counts. Salvador Santos is charged with three substantive counts. Both appellants are charged in the sixteenth count of the indictment as co-conspirators.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1101
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SALVADOR G. SANTOS and VALERIO SANTOS,
Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(August 7, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.